

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 99-10257-JMD
Chapter 7

ZLGH Development, Inc.,
Debtor

Citizens Bank of Massachusetts, Inc.,
Plaintiff

v.

Adv. No. 00-1082-JMD

Michael S. Askenaizer, Chapter 7 Trustee,
PMJ Construction Co., Inc.,
Joan E. Drepanos,
Ralph A. Jolie, Renae E. Jolie,
Kevin S. Sharp, and
City of Dover, New Hampshire,
Defendants

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MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a motion for partial summary judgment filed by PMJ Construction Co., Inc. (“PMJ”) to which Citizens Bank of Massachusetts, Inc. (“Citizens”) and Michael S. Askenaizer, Chapter 7 Trustee (the “Trustee”), object. The Court held a hearing on the motion and the objections thereto on November 1, 2000. After extensive argument by the parties, the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. BACKGROUND

At the commencement of the Debtor’s bankruptcy case on February 1, 1999, the Debtor owned and was in the process of developing certain real property known as Longhill Estates consisting of a number of lots on Fieldstone Drive in Dover, New Hampshire (the “Property”). Citizens, as successor-in-interest of USTrust and Somerset Bank, has claims against the Debtor arising from acquisition and development financing. Other entities have claims against the Debtor and its assets, including PMJ who asserts a mechanic’s lien in the amount of \$155,000.

On August 27, 1999, the Court approved a carve-out agreement that permitted the Property to be sold in bankruptcy free and clear of a variety of alleged liens and encumbrances, with the proceeds to be set aside in escrow pending a final determination of the validity, relative priority, and perfection of such liens and encumbrances. The carve-out agreement also provided for a carve-out of twenty percent of the net sale proceeds for the benefit of the Debtor’s general unsecured creditors and any administrative claimants as the Property appeared to be fully encumbered by liens and encumbrances providing no apparent equity for the benefit of the unsecured creditors of the estate or any administrative claimants. Under the agreement, the remaining eighty percent of the net sale proceeds would be set aside to benefit Citizens and any other creditor asserting a secured interest in such proceeds. All liens on the Property were to attach to the sale proceeds subject to the validity, priority, perfection, and extent of such liens.

In accordance with the carve-out agreement, Citizens commenced this adversary proceeding against creditors who asserted a lien against all or any portion of the Property so that the Court could determine the validity, priority, perfection, and extent of such liens. The validity, priority, perfection, and extent of all

liens asserted by the defendants in this adversary proceeding, except the lien asserted by PMJ, have been resolved either by stipulation or by default judgment.

PMJ alleges that it served as the general contractor to the Debtor for the development of the Property and that the Debtor failed to pay PMJ for services it rendered on the project, which services were allegedly rendered from approximately 1994 through January 1998. On May 4, 1998, PMJ obtained and recorded a mechanic's lien in the amount of \$155,000 for work it performed on all or substantially all of the Property. The litigation that PMJ commenced against the Debtor prepetition was stayed upon the filing of the Debtor's involuntary bankruptcy petition by Citizens on February 1, 1999.

III. DISCUSSION

In its motion, PMJ seeks summary judgment with respect to two issues. First, PMJ asks the Court to rule that it complied with the terms of RSA 447 in obtaining and recording its mechanic's lien. Second, PMJ requests a ruling that PMJ's mechanic's lien has priority over other lien holders, including Citizens.

Citizens objects to PMJ's motion for partial summary judgment on two basic grounds. First, Citizens argues that PMJ has failed to fully comply with the requirements of RSA 447. Second, Citizens contends that material issues of fact exist regarding whether PMJ's asserted mechanic's lien is entitled to priority over Citizens' secured claims.

The Trustee also objects to PMJ's motion for partial summary judgment. The Trustee argues, first, that PMJ's claim actually constitutes an investment in the Debtor and therefore it should not be treated as secured debt. Second, the Trustee argues that PMJ has failed to comply with RSA 447. Third, the Trustee contends that PMJ's claim is subject to equitable subordination due to PMJ's inequitable conduct.

A. Compliance with RSA 447

RSA 447:2 provides that a contractor shall have a lien for any labor performed or any material furnished with respect to the construction of a house or building. The statute further provides that the

contractor shall have a lien on any material furnished, the structure constructed, and the land on which the structure stands. See RSA 447:2. RSA 447:10 specifically provides that “[a]ny such lien may be secured by attachment of the property upon which it exists at any time while the lien continues, the writ and return thereon distinctly expressing that purpose.” RSA 447:11 provides that “[s]uch attachment shall have precedence over all lien claims for labor, materials or other things done or furnished after the attachment was made, except the same were done or furnished in the performance of a contract existing when the attachment was made, or were necessary for the preservation of the property attached.”

PMJ asserts that it has complied with RSA 447:10 and therefore it has an attachment on the Property for services it performed. Citizens contends that PMJ’s writ and return of service do not meet the requirements set forth in RSA 447:10 in that the writ of attachment and the return of service do not describe the property to be attached with reasonable accuracy and specificity. Citizens further contends that PMJ has failed to demonstrate that it filed its return of service with either the court or the register of deeds as required. In addition, Citizens argues that there are material issues of fact as to whether PMJ secured its mechanic’s lien within 120 days after it performed its services.

i. Description on Writ

According to the New Hampshire Supreme Court, in order to secure a lien under RSA 447, the plaintiff must (1) state in its writ the purpose for which the attachment is brought; (2) describe the property on which the plaintiff claims a lien with reasonable accuracy; and (3) direct the officer to attach the property to preserve the plaintiff’s lien. Gothic Metal Lathing v. Fed’l Deposit Ins. Corp., 135 N.H. 262, 263 (1992); Rodd v. Titus Constr. Co., Inc., 107 N.H. 264, 265-66 (1966). The Supreme Court has required “strict compliance” with the test set forth in its opinions. Gothic Metal, 135 N.H. at 263. In Holden Eng’r and Surveying, Inc. v. Law Offices of Raymond P. D’Amante, P.A., 142 N.H. 213 (1997), the New Hampshire Supreme Court held that a writ of attachment used to secure a lien was sufficient to satisfy the statutory requirement of RSA 447:10—that the writ and return distinctly express the purpose of the attachment—even though the return itself did not specifically state that attachment was to secure a

mechanic's lien. The Supreme Court specifically held that "the phrase 'writ and return' contained in RSA 447:10 refers to the instrument as an integrated whole, and that so long as the writ and return taken together distinctly express that the attachment is made to secure a mechanic's lien, the purpose of the attachment is sufficiently stated." Id. at 216.¹ Similarly, in Manchester Fed'l Sav. & Loan Assoc. v. Letendre, 103 N.H. 64 (1960), the New Hampshire Supreme Court held that the writ proper, the declaration and the lien command, were each an integral and complementary portion of the whole document. Id. at 69. Accordingly, while the New Hampshire Supreme Court requires strict compliance with the statutory requirements to secure a mechanic's lien under RSA 447, it does not narrowly construe the documents used to secure the lien, so long as the documents, as a whole, meet the statutory requirements.

It is unclear from the documents presented by PMJ at the hearing, which were not authenticated and which were not admitted as evidence as Citizens did not agree to their admissibility absent certification by the appropriate governmental unit, whether PMJ's writ of attachment and the return thereon complied with RSA 447:10. While it appears that the writ stated the purpose for which the attachment was brought (i.e., to secure a mechanic's lien), the Court is unable to determine whether the writ contained a reasonably accurate property description and whether the officer was directed to attach specific property. While Citizens argues that to comply with the statute the property description must be on the form, not on some attached documents as allegedly was done in this case, such a position would appear to be at odds with the policy of the New Hampshire Supreme Court as expressed in the Holden and Letendre cases. In any event, the Court need not decide this issue at this time because the documents are not part of the evidentiary record before the Court. Because there are genuine issues of material fact, the Court must deny PMJ's request for summary judgment on this issue.

¹ In Holden, the writ commanded the sheriff to attach property "specifically limited to real estate of the Defendant on Route 101-B in Hooksett, Merrimack County, State of New Hampshire and conveyed by deeds recorded in the Merrimack County Registry of Deeds at Book 1604, Page 753; Book 1604, Page 752; and Book 1604, Page 749 to secure a mechanic's lien." Id. at 215. In Holden, the Supreme Court declined to hold that RSA 447:10 requires the purpose of the attachment to be explicitly stated once in the writ and again in the return of service. Id.

ii. Filing of Return of Service

Citizens also argues that PMJ has failed to establish that it filed its return of service with either the court or the register of deeds as required. While it appears from the unauthenticated documents that PMJ did file its return of service with the Strafford Country Registry of Deeds, without an admissible copy of the return of service, the Court is unable to grant summary judgment in PMJ's favor on this issue. Accordingly, PMJ's motion for partial summary judgment is denied with respect to this issue.

iii. Work Performed within 120 Days

Citizens also argues that PMJ's mechanic's lien is not secured under RSA 447:11 because PMJ did not perform any work within 120 days of obtaining the attachment. In support of its motion, PMJ submitted an affidavit of Ronald Nestor, the principal of PMJ, who attested that PMJ performed work on the project through the end of January 1998. In support of its opposition, Citizens submitted an affidavit of David Gidge, the principal of the Debtor, who attested that PMJ only performed work through December 1997. These affidavits present the Court with a factual dispute that cannot be resolved on summary judgment.

B. Priority of Competing Liens

Citizens argues that, even if PMJ has a valid mechanic's lien, its lien is subordinate to Citizens' competing liens arising out of the acquisition loan and the development loan. Citizen further contends that, even if PMJ has a valid mechanic's lien with respect to "developed lots," PMJ cannot assert a mechanic's lien against "undeveloped lots." At the hearing, PMJ conceded that part of the loan proceeds were used to acquire the Property and that PMJ cannot have priority over the acquisition loan in accordance with RSA 447:12.

Until the Court determines that PMJ has a valid mechanic's lien, there is no need to determine the priority of PMJ's lien as PMJ may not even have a lien. Accordingly, PMJ's request for summary judgment on that issue must also be denied. In addition, the Court notes that there is nothing in the

summary judgment record to show the amounts owed on either the acquisition loan or the construction loan.

C. Investment in the Debtor

In his opposition to the motion for partial summary judgment, the Trustee alleges that PMJ and the Debtor were joint venturers and that as a result PMJ cannot obtain a mechanic's lien for the services it performed on the Property. The Trustee alleges that there are genuine issues of material fact as to whether PMJ's debt is actually a risk-investment. The Court agrees that this is a factual issue and that the record on summary judgment is incomplete.

D. Equitable Subordination

The Trustee has also raised an issue as to whether PMJ's claim should be subject to equitable subordination due to PMJ's alleged inequitable conduct. Again, the Court finds that it would be premature to rule on this issue as such a ruling would depend on factual matters that are clearly in dispute.

IV. CONCLUSION

For the above outlined reasons, the Court denies PMJ's motion for partial summary judgment. The trial in this adversary proceeding will commence as scheduled on February 5, 2001 at 9:00 a.m. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 20th day of December, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge